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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

NO. 33

EDGAR SMITH,
Petitioner

v.

THE STATE OF TEXAS
Respondent

BRIEF FOR THE STATE OF TEXAS

APPEALED FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR RESPONDENT

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AUTHORITIES

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PRELIMINARY STATEMENT

Petitioner, Edgar Smith, a negro, was tried under an indictment for the offense of rape upon a white woman. He was convicted and given a life sentence in the penitentiary. He appealed to the Court of Criminal Appeals in Texas, which is the court of last resort in said State, and it affirmed the judgment of the trial court.

The petitioner filed in the trial court a motion to quash the indictment because there was no negro on the grand jury in Harris County, Texas, who indicted him for said offense. The trial court after hearing the evidence overruled the motion and its action was upheld by the Court of Criminal Appeals in Texas.

The sole question presented in this court, as we understand, is whether said motion was properly overruled. No other Federal question being involved.

We have not been furnished a copy of petitioner's brief and cannot therefore answer same specifically.

The State of Texas presents the following propositions.

FIRST PROPOSITION

The State of Texas having answered the motion to quash and the trial court having heard the evidence and the testimony having shown that no discrimination was made in the selection of the grand jury, this court should affirm the judgment of the Court of Criminal Appeals of Texas.

SECOND PROPOSITION

There being an abundance of testimony in the record to support the trial court's findings that no discrimination was made by the jury commission in

selecting the grand jury in question, this court should affirm the judgment of the Court of Criminal Appeals of Texas.

THIRD PROPOSITION

The question raised by petitioner being only to the sufficiency of the testimony to show a discrimination against the negro race in the selection of the grand jury in question and the evidence having been fully developed, and it appearing therefrom that the evidence would and does support the findings of the trial court as well as the Court of Criminal Appeals of Texas, this court should affirm the judgment of the Court of Criminal Appeals of Texas.

STATEMENT OF THE EVIDENCE

On the motion to quash the trial court heard the evidence which is given in the record (21-40). The jury commission which selected the grand jury in question was composed of T. L. Culpepper, George W. Strake, Card C. Elliot. (R. 21)

Mr. Elliot testified that no negroes were drawn on the grand jury; (R. 21) that he did not know how many but there were a large number of negroes in Harris County. He testified "In selecting the Grand Jury I tried to select Grand Jurors who were representative of all the classes of the county. I had that in mind. . . .

"We selected the Grand Jurors from our personal acquaintance with the people over the county. . . .

"I did not select any negro as a member of the Grand Jury panel. I don't know many negroes in the county other than those who have worked for us. (R. 23)

"There was some mention of having a negro or negroes on the Grand Jury panel, but I don't recall exactly what it was. . . . I know there were no negroes among the men that I suggested. I don't know if the other two commissioners suggested any negroes or not; I know there was some discussion about it, but I can't say positively just how extensive that discussion was. I know the names were being suggested by the three of us, but there were names of people mentioned that I didn't know. We were engaged in selecting the Grand Jury panel for several hours; I think it took up the best of a half day period. I do not remember the name of any particular negro possessing the qualifications of a grand juror.

"It is my impression from reading the papers over the past years, . . . that there was usually at least one negro on the Grand Jury; . . . I do recall negroes being on the Grand Jury and reading about it. . . .

"We had no list before us when we selected the grand jury. . . . We just sat down and selected sixteen good men who we figured were qualified without any regard to anything other than their quali-

fications. It was my thought to pick a representative Grand Jury, fair to all classes. I didn't suggest any negro because I didn't happen to know any negro. I don't know at this time of a single negro in Harris County, possessing the qualifications of a Grand Juror. (R. 24) . . . .

"The question of negroes was mentioned, and it is my impression that the other gentlemen, I don't know which one, maybe both of them, mentioned the possibility of selecting a negro that would qualify. The only discussion was this; that the question of race was not to be considered; a man was not disqualified because he was a negro. . . .

"I did not intentionally, arbitrarily and systematically discriminate against any negro being selected on that Grand Jury." (R. 25)

R. R. Grobe testified "I know many negroes in this county who possess the qualifications required by statute, that is, who are of sound mind and good moral character who are able to read and write; who have not been convicted of a felony, and who are not under indictment or legal accusation for theft, and who have paid their poll tax and are qualified to vote. My best estimate there were about eight thousand such negroes in Harris County in 1938. . . .

"I don't know the number of negroes who have served on grand juries in Harris County during the

past twenty-two years; I know occasionally we have a negro on the grand jury. (R. 26) . . .

"Our observation is that one or two negroes have served on grand juries, for instance, Watson and Wilson. . . . They were not the only two, but they served regularly when negroes were selected. . . . I know one other negro that served. Both Watson and Jim Wilson were barbers; they were both good citizens. . . . Wilson died a few years back and so did Watson. Since they died I recall two negroes who have served on the grand jury in this county. C. W. Rice and a man named Terrell. Terrell is now dead, Rice is a newspaper man here . . . .

"There are eight thousand negro poll tax payers in Harris County according to my best judgment. I don't know how many of that eight thousand are women; I have no idea. I would say about three thousand out of the eight thousand poll tax payers are men, as we have more negro women who pay poll taxes than men." (R. 27)

Carl Smith testified that in 1937 there were about one hundred eight thousand poll tax payers including exemptions, that outside of the exemptions there were about eighty-five thousand who paid poll taxes for 1937. (R. 27-8)

C. F. Richardson, who edited the "Houston Defender," a weekly colored newspaper testified that he had sixty-two hundred subscribers mostly negroes. (R. 28). . . .

He further testified that approximately six thousand of the eight thousand colored poll tax payers were male persons. (R. 30)

He testified "I have never served on a grand jury, or been on the grand jury panel. I can almost count or name the negroes who have served on the grand jury in the last ten years. They are R. L. Anders, Sam Wilson, Louis Watson, Homer McCoy, C. W. Rice, Newman Dudley, I. M. Terrell, and A. W. Taylor." (S. F. 30)

W. K. Richardson testified that he was an assistant Criminal District Attorney and had been for seven years that during said time there had been five or six negroes who have served on Grand Juries. (R. 29)

J. E. Robinson testified that seventy-five per cent of the colored male population in Harris County were under the law qualified to serve as grand jurors. "I know three or four negroes who have served on grand juries in the past ten years. (R. 31-2)

L. L. Lockhart testified that he was a retired U. S., colored, mail carrier, having worked in that position for twenty-eight years in Houston. He testified "I have never served on a grand jury. I do not know of any negroes serving on any grand juries in Harris County in 1938, or in 1936. I think I have heard of some serving in the last ten years." (R. 33)

R. J. Lindley testified that he was Clerk of the

Criminal District Court in Harris County and had been since 1928. (R. 33) He testified he had a complete list of the grand jurors for the past ten years. He testified that said list showed that in 1938 John H. Kerr, a negro, was selected on the February Grand Jury; that Pierre Marks, a negro, was on the Grand Jury list for November 1937; that H. E. McCoy, a negro, was on the Grand Jury list for the May Term, 1937; that Will Wood, a negro, was on the Grand Jury list for November Term, 1936; that Alex Taylor, a negro, was on the Grand Jury panel for the February Term, 1936; that Hugh B. Watson, a negro, was on the Grand Jury panel for November, 1935; that C. W. Rice, a negro, was on the Grand Jury panel for August Term, 1935; that L. G. Luper, a negro, was on the Grand Jury panel for the May Term, 1935; that T. M. Fairchild, a negro, was on the Grand Jury panel for February Term, 1935; that James G. Ryan, a negro, was on the Grand Jury panel for the August Term, 1934; that Louis Watson, a negro, was on the Grand Jury list for the May Term, 1934; that Alex Taylor, a negro, was on the Grand Jury panel for the November Term, 1933; that Harry Mack, a negro, was on the Grand Jury panel for the May Term, 1933; that Alex Taylor, a negro, was on the Grand Jury panel for the November Term, 1932; that Homer E. McCoy, a negro, was on the Grand Jury panel for the May Term, 1932; that W. P. Cartwright, a negro, was on the Grand Jury panel for February Term. 1932; that John Kerr, a negro, was on the Grand Jury panel for the November Term, 1931; that Ber-

nice Booth, a negro, was on the Grand Jury panel for August Term, 1931." (R. 34)

L. T. Culpepper testified that he was on the jury commission which drew the grand jury in question that he was in the real estate business and had lived in Harris County nineteen years. (R. 35) He testified: "In selecting the men for grand jury service we had a list, and we tried to select men who had not previously served on the grand jury, as best we could. I felt it was our duty to be fair to all classes in the county, and to make the grand jury as representative of all classes as possible, as to race and other matters.

"I did not suggest the name of any negro to be placed on the list, because I wasn't personally acquainted with any member of the negro race. We selected men from various parts of the county. . .

"I had never met Mr. Elliot or Mr. Strake, the other two commissioners, before that time. . . .

"I thought it was customary to have one negro on the grand jury. The reason I didn't suggest any is because none came to my mind. I couldn't recall any down in my territory. . . .

"The question of placing a negro on the list came up; one of the other gentlemen brought it up, but I don't remember which one it was; they tried to think up one that possibly would be okay for grand

jury service. As I remember, the names of some few negroes were discussed. I don't recall their names. One of the other two gentlemen brought up their names as well as I remember we didn't select any negro.

"The reason I didn't suggest any negro from the City of Houston is because I wasn't familiar with any and I didn't know of any that I figured were qualified in my section of the county. (R. 36)

"The other two grand jury commissioners and I did not intentionally, arbitrarily and systematically discriminate against any negro on the grand jury panel because of his race or color; that is, I did not and nothing was said by the other two to that effect." (R. 36-37)

Judge King testified that he was the Judge of the Criminal District Court No. 2 who empanelled the Grand Jury in question and that he had been such judge for ten years. That in selecting the three grand jury commissioners he tried to get them from different sections of the county and tried to get outstanding citizens and that when he appointed and swore them "I instruct them to select sixteen men, qualified grand jurors, following the statutory qualifications, and tell them what they are, and that there must be no discrimination against any race, color, religion, or anything else. I have reminded them particularly of the negro population each time though I could not instruct them who to put on the

grand jury, and that the negro race must not be discriminated against.

"Several times since I have been here negroes have served on the Grand Jury. I don't know how many races of people there are in this county but I imagine there are as many or more than sixteen; There are Greeks, Italians, Mexicans, Czechs, Germans, Negroes and others. (R. 39). . . .

"I have always instructed the grand jury commissioners to select men without reference to creed or color, and to get a fair representation of all classes, as far as possible, with sixteen men. (R. 39). . .

"I have never failed to place a negro on the grand jury because of his color; that is, I have never excused one for that reason." (R. 40)

ARGUMENT AND AUTHORITIES

The question to be determined in this case is one of fact. In his motion to quash, petitioner alleged: "That the Grand Jury Commissioners of Harris County, Texas, had intentionally, arbitrarily and systematically for a period of many years last past excluded all persons of African descent from serving on the Grand Jury or in any event the number of negroes selected by the Grand Jury Commission for service on the Grand Juries had been so negligible as in itself to show and establish such unlawful discrimination, and that no negro was selected by

the Grand Jury Commission to serve on the Grand Jury for the August Term, 1938, at which time he was indicted" (R. 6-7).

Article 5, Section 13, of the Constitution of Texas, provides that a Grand Jury shall be composed of twelve men but that nine members thereof shall be a quorum to transact business and present bills of indictment.

Article 16, Section 19, of the Texas Constitution, provides that the Legislature shall prescribe by law the qualifications of Grand Jurors.

Article 333 of the Code of Criminal Procedure of Texas, provides that the District Judge shall appoint three jury commissioners.

Article 335 of the Code of Criminal Procedure provides that said grand jury commissioners shall appear before the Judge and take an oath that they will not knowingly select a grand juror who they believe to be unfit or not qualified.

Article 336 of the Code of Criminal Procedure provides that at the time the jury commissioners are sworn in by the Judge he shall instruct them as to their duties.

Article 338 of the Code of Criminal Procedure in Texas provides that the jury commissioners shall select sixteen men from different portions of the coun-

ty to be summonsed as Grand Jurors for the next term of court.

Article 339 of the Code of Criminal Procedure provides that a Grand Juror must be a citizen of Texas and qualified to vote; must be a free holder or a householder; must be of sound mind and good moral character; must be able to read and write; must not have been convicted of any felony; must not be under any indictment for theft or any felony.

Article 340 of the Code of Criminal Procedure of Texas requires that the list of names selected to serve as Grand Jurors be sealed in an envelope.

Article 344 of the Code of Criminal Procedure requires the District Clerk to open said envelope thirty days before court meets and make a copy of the Grand Jury and deliver it to the Sheriff.

It is therefore apparent that every precaution possible has been taken to prevent any discrimination against any class or classes of people in serving on grand juries because of their race or religious creed.

The record in this case shows that there are approximately one hundred and eight thousand poll tax payers in Harris County of which approximately eight thousand are negroes and from this list the grand jury commissioners can only draw sixteen names for grand jury service.

The records show that there are at least sixteen different nationalities in the City of Houston. The court can perhaps take judicial notice that every religious creed and faith would be and is represented by the voters in Harris County, Texas. It is therefore impossible to have every race and every creed represented on each Grand Jury that is empanelled.

It is, we think, appropriate to call the court's attention to the fact that under the law in Texas the Grand Jury consists of twelve men to be selected by the Court from the sixteen drawn by the Jury Commission. The trial judge cannot control in any way who the Jury Commissioners select. He must however, take the grand jury from the list drawn, if they are present and in court, and are under the law qualified. The trial court has no way of compelling a Grand Jury Commission to select any particular class of people, it is his duty to instruct the grand jury commission as to their duties and responsibilities.

In the case at bar no contention is made about the three jury commissioners being outstanding good citizens in Harris County. They were properly and legally selected by the court. Judge King who selected the Jury Commission testified that he tried to select three good men and that when he swore them in he instructed them as to their duties and responsibilities and that he told them "that there must be no discrimination against any race, color, religion or anything else." (R. 38) It therefore appears that there is nothing that the trial court could

have possibly done that was not done in the organization and selection of the Jury Commission which drew the Grand Jury which in turn indicted petitioner, Edgar Smith.

The two Grand Jury Commissioners who were called to testify, Mr. Elliot and Mr. Culpepper, each testified in effect that in selecting the Grand Jury they tried to select Grand Jurors who were representative of all the classes of the county. And that they did not intentionally, arbitrarily and systematically discriminate against a negro being selected on that Grand Jury. And that the reason no negro was selected was because they did not know the name of any negro who was qualified.

Mr. Lindley, the District Clerk, produced the list of Grand Jurors for ten years which showed that eighteen times negroes had been selected on the Grand Jury panel and in several instances had served on the Grand Jury and in some instances had been excused from service because of their, the negroes', request to be excused. (R. 33 & 37)

There were approximately one hundred and eight thousand qualified voters in Harris County. (R. 28) Of these approximately eight thousand were negroes. (R. 27) It, therefore, appears that about one out of every fourteen qualified voters in Harris County were negroes. Under the Constitution and laws of the State of Texas the Grand Jury consists of only twelve men who must be qualified voters.

In the case at bar the District Judge in empanelling the Grand Jury Commission of three men selected out of the one hundred and eight thousand qualified voters in Harris County instructed them that they should not in the selection of the Grand Jury discriminate against any race, color, religion or anything else and especially that they should not discriminate against the negro population. (R. 38) The record as a whole belies the statement or suggestion that during the past ten years the Grand Jury Commissioners had systematically kept negroes off the Grand Jury panel to the contrary the record shows that each year there has been drawn one or more negroes on the Grand Jury panel.

Counsel is familiar with the case of *Martin* v. *The State of Texas*, 200 U. S. 316, which lays down the doctrine that "whenever by any action of a state whether through Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color, from serving as Grand Jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States."

The above principle has been recently followed by this court in *Pierre* v. *State of Louisiana*, 306 U. S. 354, and in *Hale* v. *Kentucky*, 303 U. S. 614.

The Court of Criminal Appeals in Texas has been

equally zealous to guard the rights of the negroes and Mexicans from unjust discrimination.

In *Juarez* v. *State of Texas*, 277 S. W. 1091, the Court of Criminal Appeals in Texas reversed the judgment because of the alleged unjust discrimination against the defendant because he was a Catholic holding the trial court should have heard the evidence and if the alleged discrimination was found to be true the indictment should be quashed.

In *Johnson* v. *State of Texas*, 124 S. W. (2d) 1001, the Texas Court of Criminal Appeals reversed the judgment because the records showed that there had been a discrimination against the negro race in the selection of the grand jury which indicted the defendant.

While this court in the case of *Martin* v. *State of Texas*, 200 U. S. 316, laid down the general rule quoted above, it affirmed the judgment of the Court of Criminal Apeals, because the defendant failed to prove the negro race had been discriminated against in the selection of the grand jury and held that it was incumbent upon the defendant not only to allege the discrimination but to prove same. This court said:

> " 'No evidence was offered in support of the motion by the accused to quash the indictment, unless the facts set out in the written motion to quash, verified to the best of his knowledge and belief, can be regarded as evidence in support of the motion. We are of the opinion that it

could not properly be so regarded. . . . The facts stated in the written motion to quash although that motion was verified by the affidavit of the accused, could not be used in evidence to establish those facts, except with the consent of the State Prosecutor or by order of the trial court. No such consent was given. No such order was made. The grounds assigned for quashing the indictment should have been sustained by distinct evidence introduced or offered to be introduced by the accused. He could not, of right, insist that the facts stated in the motion to quash should be taken as true. . . . The motion to quash was, therefore, unsupported by any competent evidence; consequently it cannot be held to have been erroneously denied.' " . . .

"A different conclusion in this case would mean that, in a criminal prosecution of a negro for crime, an allegation of discrimination against the African race because of their race could be established by simply proving that no one of that race was on the grand jury that returned the indictment, or on the petit jury that tried the accused; whereas, a mixed jury, some of which shall be of the same race with the accused cannot be demanded as a right, in any case; nor is a jury of that character guaranteed by the Fourteenth Amendment. What an accused is entitled to demand, under the Constitution of the United States is that in organizing the grand jury as well as in the empanelling the petit jury, there shall be no exclusion of the race, and no discrimination against them, because of their race or color."

In *Ramirez* v. *The State of Texas*, 40 S. W. (2d) 138, in which this court refused a writ 284 U. S. 659,

the Court of Criminal Appeals of Texas held that the evidence was not sufficient to show a discrimination against the Mexican race in selection of Grand Jurors although the records showed one-tenth of the population in the county was Mexican and yet no Mexican had ever been selected on a petit jury or grand jury in said county. To the same effect is the opinion of the Court of Criminal Appeals in Texas in *Lugo* v. *State*, 124 S. W. (2d) 344.

In the case at bar the Court of Criminal Appeals in Texas, after stating that the motion to quash the indictment had been filed and overruled, used this language:

> "This motion was contested by the State and the court heard evidence thereon. We do not deem it necessary to set out the evidence at length, but it is our opinion that the same wholly fails to show an intentional and arbitrary refusal to select negroes for the grand jury service on the panel that returned the indictment against the appellant. All of the grand jury commissioners stated there was no expressed and intentional disregard for members of the negro race." (R. 44)

On motion for rehearing the Court of Criminal Appeals in Texas relative to the motion to quash used this language:

> "Looking to the testimony heard upon the motion to quash the indictment, it is observed that we were in error in our statement in the original opinion that all the jury commissioners testified

that there was no intentional exclusion of members of the negro race from the grand jury. Only two of the commissioners testified upon the hearing. Mr. Elliot, one of the Commissioners, testified that he did not recall whether any negroes were drawn by the commission. He said that the names of some negroes were mentioned during the time the selection was being made. Further, he testified that he did not suggest a negro because he did not know the name of any negro at the time living in Harris County who possessed the qualifications of a grand juror. On his cross examination he said: 'I did not intentionally, arbitrarily and systematically discriminate against any negro being selected on that jury.' Mr. Davis (Culpepper), the other member of the jury commission who testified upon the hearing, said that in selecting the Grand Jury he felt that it was the duty of the commission 'to be fair to all classes in the county.' Further, he testified that he suggested the name of no negro because he was not personally acquainted with any member of the negro race. Upon cross examination he said 'the other two grand jury commissioners and I did not intentionally, arbitrarily and systematically discriminate against putting a negro on the grand jury, because of his race or color; that is, I did not and nothing was said by the other two to that effect.' It appears from the agreement entered into between the District Attorney and counsel for appellant that in 1930 there were seventy-two thousand six hundred and two negroes in Harris County, including men, women and children. Furthermore, it appears that in 1937 there were between seven and eight thousand negroes who paid their poll taxes. Again, it was shown that a large number of negroes possessed the qualifi-

cations of grand jurors. W. K. Richardson, a witness for the State, testified that four grand juries were selected each year. He said: 'During the seven years I have been associated with the grand jury I would say that five or six negroes have served on some grand juries; that is just a guess. I think one of those negroes served two different times, not in succession.' He testified that there was no negro on the grand jury that indicted appellant. At this juncture we quote his testimony as follows: 'I have been present on practically all occasions when Judge King and Judge Boyd have charged the grand jury commissioners on the selection of grand jurors. They have been instructed to select citizens from all parts of the county and of all different races or walks of life. The court instructed the grand jury commissioners on the law governing the selection of grand jurors. I do not recall seeing any negro grand jury commissioner. They have all been white that I have seen.'

"C. F. Richardson, a witness for appellant, testified that there was approximately six thousand negro men who paid poll taxes in Harris County during the year 1938. He could not say how many of these men possessed the qualifications of a grand juror. We quote from his testimony as follows: 'I can almost count the names of the negroes who have served on the grand jury in the last ten years.' The witness then named approximately seven negroes.

"Several negro men testified that they had never served on a grand jury. Their testimony was to the further effect that they possessed the qualifications of grand jurors. There was testimony to the effect that there were very few

illiterate negroes in the county. There was also testimony to the effect that about eighteen negroes had been drawn by the jury commissioners for grand jury service since 1931. The Clerk of the Criminal District Court No. 2 of Harris County testified that on several occasions that the negro on the panel was number sixteen. However, his testimony was to the effect that negroes had been serving on the grand juries.

"The trial judge testified that he made it a rule in instructing jury commissioners that there should be no discrimination against any race, color, or religion. He said 'I have reminded them particularly of the negro population each time, though I could not instruct them who to put on the grand jury, and that the negro race must not be discriminated against. Several times since I have been here negroes have served on the grand jury. I don't know how many different races of people there are in this county.' " (R. 47-8)

The Court of Criminal Appeals, after reviewing the testimony on motion for rehearing and quoting therefrom at length as above set forth, held that as a matter of fact the record did not and does not show any discrimination was or has been practiced against the negro race in Harris County in the selection of the grand juries.

Unquestionably we submit the evidence is sufficient to sustain the finding of fact made by the trial court as well as by the Court of Criminal Appeals in Texas that there was no discrimination. This case

is distinguishable from the case of *Hale* v. *Kentucky*, supra, and *Pierre* v. *Louisiana*, supra, and the authorities cited in those opinions, as well as *Johnson* v. *State of Texas*, 124, S. W. (2d) 1001, and *Juarez* v. *State of Texas*, 277 S. W. 1091, because the record in each of said cases revealed the fact that the negro race had been discriminated against.

In the case at bar we submit the evidence shows without controversy that no discrimination against the negro race existed in Harris County. The officers in said county were and are attempting to enforce the law impartially against all races and are trying to obey the law as construed by this court as well as by the Court of Criminal Appeals in Texas. The trial court persistently instructs the jury commissioners not to discriminate against the negro race. This is as far as he could possibly go in the matter. The jury commissioners have drawn in the last ten years as many negroes for service on the grand jury as they have white men in proportion to the population of Harris County. The two jury commissioners called in the case at bar testified positively that they had not intentionally discriminated against the negro race. If this court holds under the facts in this case that there was a discrimination as a matter of law against the negro race, then the State of Texas submits that there is no way for it to at any time combat the contention of a negro defendant that he had not been discriminated against unless it was shown that a number of negroes had been in fact not only summonsed but had been made to serve upon a grand jury. This

we submit is not the law. As was so aptly said by this court in *Martin* v. *State of Texas*, 200 U. S. 316.

> "A mixed jury, some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case; nor is a jury of that character guaranteed by the Fourteenth Amendment."

WHEREFORE, the State of Texas prays that the judgment of the Court of Criminal Appeals in Texas be in all things affirmed.

Copies of this brief have been furnished counsel for petitioner.

Respectfully submitted

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SMITH *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 33. Argued November 14, 1940.—Decided November 25, 1940.

1. The conviction of a Negro upon an indictment returned by the grand jury of a county in which, at the time of such return and long prior thereto, Negroes were intentionally and systematically excluded from grand jury service, solely on account of their race and color, denies to him the equal protection of the laws, in violation of the Fourteenth Amendment of the Federal Constitution. P. 132.
2. Upon review of a state court decision wherein a claim of a right under the Federal Constitution was denied, this Court will examine and appraise for itself the evidence relating to such right. P. 130.
3. The evidence in this case sustains the claim of racial discrimination in the selection of the grand jury by which the Negro defendant was indicted; and, whether such discrimination was accomplished ingeniously or ingenuously, his conviction was void. Pp. 130–132.

136 S. W. 2d 842, reversed.

CERTIORARI, 309 U. S. 651, to review the affirmance of a judgment sentencing the petitioner upon his conviction of a crime. The trial court had overruled a motion to quash the indictment.

Mr. Sam W. Davis, with whom *Messrs. William A. Vinson* and *Harry W. Freeman* were on the brief, for petitioner.

Mr. George W. Barcus, Assistant Attorney General of Texas, with whom *Messrs. Gerald C. Mann,* Attorney General, and *Lloyd Davidson,* State Criminal Attorney, were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

In Harris County, Texas, where petitioner, a negro, was indicted and convicted of rape, negroes constitute

over 20% of the population, and almost 10% of the poll-tax payers; a minimum of from three to six thousand of them measure up to the qualifications prescribed by Texas statutes for grand jury service. The court clerk, called as a state witness and testifying from court records covering the years 1931 through 1938, showed that only 5 of the 384 grand jurors who served during that period were negroes; that of 512 persons summoned for grand jury duty, only 18 were negroes; that of these 18, the names of 13 appeared as the last name on the 16 man jury list, the custom being to select the 12 man grand jury in the order that the names appeared on the list; that of the 5 negroes summoned for grand jury service who were not given the number 16, 4 were given numbers between 13 and 16, and 1 was number 6; that the result of this numbering was that of the 18 negroes summoned, only 5 ever served, whereas 379 of the 494 white men summoned actually served; that of 32 grand juries empanelled, only 5 had negro members, while 27 had none; that of these 5, the same individual served 3 times, so that only 3 individual negroes served at all; that there had been no negroes on any of the grand juries in 1938, the year petitioner was indicted; that there had been none on any of the grand juries in 1937; that the service of negroes by years had been: 1931, 1; 1932, 2; 1933, 1; 1934, 1; 1935, none; 1936, 1; 1937, none; 1938, none.

It is petitioner's contention that his conviction was based on an indictment obtained in violation of the provision of the Fourteenth Amendment that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." And the contention that equal protection was denied him rests on a charge that negroes were, in 1938 and long prior thereto, intentionally and systematically excluded from grand jury service solely on account of their race and color. That a conviction based upon an indictment returned by a jury so

selected is a denial of equal protection is well settled,[1] and is not challenged by the state. But both the trial court and the Texas Criminal Court of Appeals were of opinion that the evidence failed to support the charge of racial discrimination. For that reason the Appellate Court approved the trial court's action in denying petitioner's timely motion to quash the indictment.[2] But the question decided rested upon a charge of denial of equal protection, a basic right protected by the Federal Constitution. And it is therefore our responsibility to appraise the evidence as it relates to this constitutional right.[3]

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it [4] but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.

Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial dis-

[1] *Pierre* v. *Louisiana*, 306 U. S. 354; *Martin* v. *Texas*, 200 U. S. 316, 319; *Carter* v. *Texas*, 177 U. S. 442, 447.

[2] 136 S. W. 2d 842.

[3] *Chambers* v. *Florida*, 309 U. S. 227, 228; *Pierre* v. *Louisiana*, 306 U. S. 354, 358; *Norris* v. *Alabama*, 294 U. S. 587, 590.

[4] "No citizen possessing all other qualifications . . . shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; . . ." 18 Stat. 336, 8 U. S. C. § 44.

crimination whatsoever.[5] But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable. And from the record before us the conclusion is inescapable that it is the latter application that has prevailed in Harris County. Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a negro's name, when listed at all, almost invariably appeared as number 15, and under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list.

The state argues that the testimony of the commissioners themselves shows that there was no arbitrary or systematic exclusion. And it is true that two of the three commissioners who drew the September, 1938, panel testified to that effect. Both of them admitted that they did not select any negroes, although the subject was discussed, but both categorically denied that they intentionally, arbitrarily or systematically discriminated against negro jurors as such. One said that their failure

[5] The statutory scheme is set out in the Texas Code of Criminal Procedure, Articles 333–350. At each term of court, three grand jury commissioners are appointed; at the time they are sworn in, the judge instructs them as to their duties; they are required to take an oath not knowingly to select a grand juror whom they believe unfit or unqualified; they must then retire to a room in the court house, taking the county assessment roll with them; while in that room they must select a grand jury of 16 men from different parts of the county; they must next seal in an envelope the list of the 16 names selected; thirty days before court meets the clerk is required to make a copy of the list and deliver it to the sheriff; thereupon the sheriff must summon the jurors.

to select negroes was because they did not know the names of any who were qualified and the other said that he was not personally acquainted with any member of the negro race. This is, at best, the testimony of two individuals who participated in drawing 1 out of the 32 jury panels discussed in the record. But even if their testimony were given the greatest possible effect, and their situation considered typical of that of the 94 commissioners who did not testify, we would still feel compelled to reverse the decision below. What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.

Reversed.